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DEPARTMENT OF  
WATER RESOURCES

December 28, 2012

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RE: Compliance with Water District No. 34 Water Distribution Rules  
(2012 narrative statement)

Dear Legislators and IDWR Administrators;

The purpose of this letter is to provide a current narrative statement regarding how Water District No. 34 Watermaster, Advisory Committee members, and water users are responding to IDWR's efforts to enforce WD 34 Distribution Rules. To properly describe these compliance efforts it is necessary to provide a brief historical background regarding why the rules were originally promulgated and how some water users have made several previous attempts to encourage the implementation of the rules in water district operations since they were promulgated by the Director of IDWR and approved by the State Legislature making them the "law of the land".

During the 1970s and 80s numerous protests and petitions alleging injury to existing water rights and complaints of illegal use of the basin's water resources (the actual number may exceed several 100) were filed with IDWR regarding applications for appropriation and/or the transfer of water rights. Those protests and petitions reached a feverish pitch in the early 1990s. The Director of IDWR, R. Keith Higginson, responded to these complaints by conducting several local water meetings and hearings which ultimately resulted in the issuance of an administrative Final Order dated August 7, 1990. That Order and other documents referenced herein can be accessed at <http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/BigLost/>.

While this Final Order provided some framework for water administration in Basin 34, certain water users continued filing protests, objections, and petitions before IDWR challenging the water resources used by other water users. In response, Director Higginson filed a motion in the SRBA Court to adjudicate the water rights and general provisions in Basin 34 as the first reporting area and test basin in the general adjudication. As part of those proceedings, the SRBA Court issued a series of orders granting interim administration and ordered the Director of IDWR to promulgate rules for Basin 34 beginning on December 18, 1992 and continued that Order of Interim Administration from year to year until partial decrees were ultimately issued by the SRBA Court.

In compliance with the SRBA Court Order, Director Higginson, gave Notice of Intent to Promulgate Rules pursuant to IDAPA 04.11.01812 to all water users within Basin 34 on August 5, 1993. This notice

was followed by a September 15, 1993 Discussion Paper which specifically stated the purpose of the proposed rulemaking was “.... water distribution in Water District 34, the Big Lost River basin, including conjunctive management of surface and ground water ....”. Water users were given ample opportunity to participate in the rulemaking process by providing oral and written comment and advisory committee involvement. That process included dozens of IDWR sponsored meetings and voluminous oral and written testimonies and comments.

The temporary draft rules were docketed for review on April 21, 1994 and were ultimately ratified and approved by the State Legislature. The rules effectively became the “law of the land” on Oct. 26, 1994. Portions of these rules subsequently became superseded by the issuance of the SRBA Court partial decree describing general provisions for the administration and distribution of water supplies in Basin 34 in July of 2004. Where the decreed general provisions and the promulgated rules appear to contain contradicting language there is an existing need for authoritative clarifying interpretation and legal guidance. This conflicting language underscores the continuing need for proper legal review and interpretation of the respective provisions by IDWR or Judicial Authorities, not local persons who may have inherent conflicts of interest.

Strangely enough, the water distribution rules (specifically tailored to the unique water circumstances, conditions, and local interests that exist in Basin 34) no sooner became the governing law than they were basically forgotten by most local water users and officials. Water regulation and distribution reverted back to the old status quo of “folk lore and tradition” having a form of compliance but denying the proper interpretation and application of the same. It was not until a small group of family irrigators holding senior priority surface water rights which are diverted from the lower reaches of the Big Lost River made a delivery call on junior ground water users that local water officials and water users were forced to look at the rules and begin understanding how water should be distributed pursuant to these rules. This delivery call made in April of 2004, ten years after the State Legislature approved the distribution rules, had the effect of immediately bringing the distribution rules back into play.

Most of the water users, especially the protestors and objectors, struggled to understand the real purpose for the delivery call. It was not to curtail the junior ground water users, but to bring the distribution rules back into focus, protect water priorities and supplies from futile calls, and cause water allocations and distribution to be done subject to the laws of the State of Idaho rather than the traditional loose system of status quo or private interpretation. The following months during 2004 and 2005 were spent by IDWR officials trying to get local water users to respond to the delivery call by submitting an appropriate basin wide mitigation plan that could be reviewed and approved by the Director. The development of an acceptable mitigation plan was difficult and socially very unpopular.

The enforcement of the distribution rules associated with this delivery call came to an abrupt halt at the local water meeting held at the Mackay High School Auditorium when the local watermaster and law enforcement officers openly stated they would not enforce the rules. The chat heard from fragmented user groups was “.... civil disobedience, civil disobedience”. The refusal from water users to comply with the distribution rules, as burdensome and unpopular as they might be, has affirmed the local mind-set that the rules can be ignored or misinterpreted if local water officials don’t like or agree with them. Protestors, objectors, and elected watermaster(s) continued to follow their own interpretations of the rules by picking and choosing which rules justified their ideological preferences and social agendas, while simply ignoring the rest.

Following the deviation from the partial decrees and distribution rules during these irrigation seasons, a letter requesting the investigation of the watermaster was sent to the Director of IDWR on March 17, 2006. This letter again brought the distribution rules into focus and demonstrated the need for IDWR intervention in water districts operations, accounting, and allocations of water supplies. The letter questioned the accuracy of records Water District 34 is required by Idaho Law to keep. The concerned water users also stated very clearly their commitment “to assist and cooperate in every appropriate way to bring accurate and honest measuring and accounting procedures and the administration of water rights in Water District 34 in complete compliance with the applicable Idaho State laws, rules, and regulations.” This investigation request was ultimately withdrawn only because IDWR staff personnel committed and subsequently made significant progress in providing guidance and instruction to the watermaster and WD 34. IDWR has kept that commitment as evidenced by their providing Water District 34 Guidelines for Operation. This document is regularly revised and has been updated as recently as October 29, 2006. Additional clarification regarding contested issues and administrative guidance relating to water usage disputes has also been provided by specific letter of correspondence (i.e. June 11, 1999, Final Guidance Document for Distribution of Alder Creek Water Rights and Flows, and April 22, 2011, Storage and Use of the Big Lost River by the Big Lost River Irrigation District). These instructional and enforcement efforts are most appreciated by all concerned water users.

Water users and local administrators slowly began to embrace the rules and partial decrees with notable improvements in water regulation and distribution in each subsequent irrigation season. Unfortunately some of these improvements have now been offset and in some instances totally negated by local individuals and/or entities that have either abrogated their duties and/or usurped authority which is not theirs. This behavior is rooted in the belief that water administration should be driven by a “this is how we have done it for the last 100 years” mentality instead of compliance with governing State Statute, SRBA decrees, and the promulgated distribution rules.

On October 27, 2011, concerned water users again met with a few legislators and key IDWR administrators in Arco to ask for intervention and continue improvement efforts into water district management and operations. That meeting was followed up with a discussion paper and meeting with legislators in Boise on Feb. 16, 2012. At that meeting the legislators asked the concerned water users to provide them with specific examples where water measurements and allocations were inconsistent with the water distribution rules. That response was provided in a February 21, 2012 letter which highlighted the need for measurement facilities in river reaches, the need for actual demand calls documentation from water users, proper allocation of the available water supply among those calling for water, independent accounting by WD 34, and more efficient delivery of those water supplies once they are diverted into the canals, laterals, and impoundment facilities.

In response to these letters and meetings, Director Spackman sent a May 2, 2012 letter to Water District 34 regarding Compliance with Water District No. 34 Water Distribution Rules wherein he properly set forth some fundamental areas where the water district is currently out of compliance with governing laws, rules, or standards of performance. He also asked the watermaster and advisory committee to submit an acceptable proposed work plan within 90 days of the letter describing how the water district would comply with those minimal standards of operation and accounting procedures prior to the commencement of the 2013 irrigation season.

The advisory committee and watermaster met several times in May, June, and July of this year to respond to the Director's request. Unfortunately most of the time in those meetings was spent challenging the Director's understanding of Water District 34's operations, as well as criticizing those local concerned water users who agree with the Director's conclusions. Those challenging the Director are taking the position that WD 34 is already in compliance with the rules and the Director simply does not understand how WD 34 is actually operating. The net result of this position was the submission of a very incomplete and vague Initial Compliance Work Plan that never addressed the real issues relating to the enforcement of and compliance with the water distribution rules.

The Director and staff administrators have patiently responded by sending a second letter dated September 11, 2012 informing the watermaster and advisory committee that the initial compliance work plan was not accepted and carefully explained why. This second letter also recognized that current WD 34 operations might be in compliance with the distribution rules to some degree, but properly asks the watermaster and advisory committee to describe those current operations in complete detail so an honest evaluation and discussion can be had. To that end the Director again directed the watermaster and the advisory committee to submit a detailed work plan with supporting documents including calculation worksheets, design diagrams, funding provisions, implementation timelines, and other necessary descriptions and explanations addressing the essential functions and operations of the water district within 30 days of this second letter.

In response to the September 11, 2012 letter, and as of the date of this writing, no local WD 34 advisory committee meeting has even been scheduled to develop a revised detailed work plan to establish measurement facilities at the three locations on the Big Lost River. The watermaster did submit a brief statement dated October 10, 2012, in which he tried to describe WD 34 operational details. However the statement is so incomplete and ambiguous that it raises more questions than it answered. The watermaster's response does include opaque statements such as, *"Natural flow water is not and can not be directly measured in the Big Lost River, Because a significant amount of "Natural Flow" water is from rising water between the Dam gates and the 2B gage, a small portion of which is seepage."* and *"I think the process is more art than science therefore many questions will be asked"*. Nevertheless, his filed statement failed to include clear descriptions how he calculates the available natural flow, how he determines demand for that natural flow, and how he delivers the natural flow to users according to the priority of their water rights. Certainly many more questions will need to be asked and answered.

These non-response(s) from local officials leaves IDWR administrators in the position of having to develop enforcement plans without the benefit of the preferred local input and open dialogue. The Director is simply asking for a clear statement explaining what, how, and who is doing the measuring, allocating, and record keeping relating to the regulating of the river resource so an honest evaluation can be had. The non-response to the Director's multiple written requests is a dismal indicator of how dysfunctional WD 34 operations really are. Fortunately IDWR administrators are persistent in working to enforce the rule of law. With the encouragement of the concerned water users, IDWR scheduled an open public meeting for December 10, 2012 held at the Mackay City Hall. This meeting's agenda was prepared and presented by Nick Miller and Tim Luke in an effort to ensure that essential tasks were properly outlined and focused on. State officials clearly explained the need for measurement facilities in the river reaches as required by the rules, and instructed attending members of the advisor committee to proceed with the design and funding requirements, and the submission of a revised work plan to the Director for his review and approval. They also spent considerable time describing the details of the

independent accounting system. This part of the presentation was more difficult for local officials and water users to understand because of the numerous variations that do exist when water supplies are allocated and distributed.

Local response to this December 20<sup>th</sup> meeting was mixed. The concerned water users, and other water users who have now invested study and analysis into the matter, support the enforcement efforts of state officials. Other water users and local officials who prefer nothing change are still ignoring the instructions and guidance given by IDWR officials. This resistance to change was best illustrated by the watermaster when he was asked after the meeting, “What do you think?” and he responded “I think this is a waste of my time”. Members of the advisory committee who attended the meeting and are supportive of moving forward are still helpless to do so until the committee chairman calls a committee meeting so a proper work plan can be developed.

Again, as of the writing of this narrative, no advisory committee meeting has been called since the initial work plan was submitted. The concerned water users are extremely frustrated by the lack of meaningful response from local officials. We believe IDWR officials are equally frustrated, and are trying to balance state government intervention with local public involvement.

The facts of the matter are:

- 1.) The protestors, objectors, and petitioners continue to harass certain water users whenever an application for change is filed with IDWR or irrigation practice is commenced they don’t agree with (i.e. stacking of water rights, relocation or use of a different conveyance system, water bank leases, acceptable measurement facilities and devices, independent accounting, etc.).
- 2.) The distribution rules and general provisions that define how water is to be administered, and how injuries are to be remedied, are generally ignored by local officials unless they can use them (the rules) in a manner to further their harassment.
- 3.) IDWR officials, trying not to issue harsh edicts or mandates from Boise, have actually become part of the problem. They have spent limited agency resources for multiple hearings on the case by case files, but have failed to use this same enforcement authority on the broader WD 34 instances of non-compliance with the basin-wide rules.
- 4.) Protestors, objectors, and petitioners continue to deny that their use of the resource has the same effect on the water resource that the uses they are challenging do, and will do nothing to promote the compliance efforts that IDWR officials are trying to enforce in a general and fundamental manner.
- 5.) It is a predictable matter that the concerned water users who are providing this narrative statement will be targeted and vilified by extreme local interests because they have the courage to challenge the “status quo of non-compliance” by calling for the enforcement of the rules.

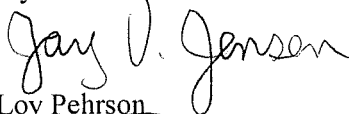
It has now been 18 years since the water distribution rules were promulgated. As of this date, the rules are still not fully implemented and enforced. Extremists continue to use protest, objection, and petition tactics to harass and allege injury by those who use the water resource in a manner not agreeable to their historically prejudicial views. Local officials continue to ignore or delay an appropriate response to IDWR quires. Depending on how state and local officials proceed, the concerned water users believe the time has come for IDWR administrative orders to be issued to WD 34 (watermaster and advisory committee) that set forth what must be done initially (the same things that have been set forth in the May 2, 2012 and September 11, 2012 letters) as part of local water district’s upcoming budgeting process and 2013 annual meeting.

Subsequent orders may also be necessary if local officials fail to act in good faith and understand their duty is to comply with IDWR enforcement efforts. The Director has the authority to impose monetary penalties on WD 34, and limit or temporally suspend certain questionable practices that are employed throughout the water district. His enforcement and administrative orders should protect vested water rights from injury caused by the operational malfeasance of local officials who continue to ignore the State of Idaho's requests and instructions.

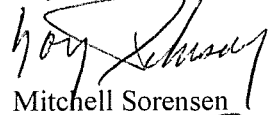
This concludes the 2012 narrative statement. A 2013 narrative statement will be drafted and updated as these matters proceed in the upcoming year. Thank you for your attention to these most pressing matters.

Sincerely,

Jay Jensen



Loy Pehrson



Mitchell Sorensen



Copy to:        Roger Totten, WD 34 Watermaster  
                     Seth Beal, WD 34 Advisory Committee Chairman